In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1043

EDWARD M. OSTENDORFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An information was filed against petitioner charging him with wilful failure to file his federal income tax returns for the years 1959, 1960, and 1961, in violation of Section 7203 of the Internal Revenue Code of 1954 (A-295-296).[1] After a jury trial he was found guilty on all three counts, fined $2,500, and sentenced to six months in prison to be followed

[1] "A" references are to the Appendix for Appellant in the court of appeals.

by three years probation (A-327). The court of appeals affirmed (Pet. App. A). Further review is not warranted.

1. The evidence showed that petitioner had filed income tax returns for the years 1956, 1957 and 1958 (A-10), but had not filed for 1959, 1960 and 1961 (A-10-11). No extensions were ever granted for the filing of these returns, and at the time of the trial they still had not been filed (A-14, A-262). Petitioner's gross income was $68,915.16 in 1959, $79,993.45 in 1960 and $74,499.24 in 1961 (A-5), and his income tax liability was $2,645.26 for 1959, $9,044.56 for 1960 and $7,336.29 for 1961—a total of $19,026.47 (A-55). Petitioner had also failed to file State income tax returns with the South Carolina authorities for the years 1959, 1960, and 1961 (A-87). In February 1963, when agents of the Internal Revenue Service asked him whether he had filed returns for the years in question, he replied that he had not, and explained that he had not had time to get his records in such order that he could take them to someone to prepare the returns (A-20, A-23). The essence of the defense at trial was that petitioner had been extremely busy with his various life insurance and estate planning enterprises and had never had the time to get around to taking care of his tax returns. He admitted knowing that the returns should have been filed each year by April 15 (A-37). The evidence also showed that petitioner held the title of Chartered Life Underwriter (A-175), that he had attended college and business school, and that he had taken courses in commercial law and accounting (A-52, A-175).

2. a. Petitioner's argument that the evidence was insufficient to support the verdict (Pet. 10-11) is without substance. All the government was required to establish was that petitioner was a person required to file returns, that he had failed to do so, and that such failure was wilful. The first two elements were conceded at the trial. The jury could readily infer wilfulness from the evidence that petitioner had failed to file for three consecutive years; that such failure continued to the time of the trial and embraced not only federal but also State tax returns; that no satisfactory explanation for the failure was forthcoming although petitioner testified in his own behalf; that petitioner knew the returns were due on April 15 of each year; and that he had taken courses in commercial law and accounting and was a Chartered Life Underwriter specializing in estate planning.

b. Neither is there merit in the argument (Pet. 6-7) that the trial judge deprived petitioner of a fair trial by questioning witnesses and intruding too much in the trial. A federal judge, of course, has the right to aid in eliciting truth, so long as he does not become an advocate for either side. *Fritts* v. *United States*, 80 F. 2d 644 (C.A. 10); *United States* v. *Aaron*, 190 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827; *Hellman* v. *United States*, 339 F. 2d 36, 37-38 (C.A. 5); *Simon* v. *United States*, 123 F. 2d 80 (C.A. 4); *Kowalsky* v. *United States*, 290 F. 2d 161, 163 (C.A. 5), certiorari denied, 368 U.S. 875. As the court of appeals found, the judge here did not cross

the line; the few instances complained of (Pet. 15-20) are selected from a 450-page trial transcript and, when read in proper context, are seen to be harmless. As for the judge's failure to give a "cautionary instruction" (Pet. 6-7) that the jury was the sole judge of the facts, we point out that no such instruction was ever requested.

c. Petitioner contends (Pet. 7-9) that the trial judge committed plain error when he gave the following instruction as part of the definition of wilfulness (A-303):

> This, of course, is a criminal proceeding, and the word willful as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive.

No objection to this instruction was made at the trial, as required by Rule 30 of the Federal Rules of Criminal Procedure. While in *Forster* v. *United States*, 237 F. 2d 617, the Ninth Circuit held that a somewhat similar instruction had been given such prominence in a supplemental charge that it constituted reversible error—when timely objection was made—the same circuit, in *Herzog* v. *United States*, 235 F. 2d 664, certiorari denied, 352 U.S. 844, emphasized that the instruction itself was not plain error and must be read in conjunction with the charge as a whole, rather than in isolation. Here the district court repeatedly charged that negligence—even gross negligence—was insufficient to convict; that wilful meant purposeful, deliberate and intentional, as dis-

tinguished from accidental, inadvertent or negligent; and that it meant an act done with a bad purpose or bad motive (A-301, A-302, A-303). Most pointedly, no reference to the instruction now complained of was made in the supplemental instruction on wilfulness given to the jury after it had asked for guidance during its deliberations (see A-308-309).[2]

d. There is no merit to the contention (Pet. 9-10) that the trial court committed reversible error in instructing the jury (A-304):

> It is also of some significance that the degree of proof required to show willful failure to file a return, the misdemeanor involved here, is not so demanding as if this were a prosecution for willful tax evasion, a felony.

This was a correct statement of the law. To establish the felony of wilful attempted tax evasion, "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statu-

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[2] The only other decision relied upon by petitioner, *United States* v. *Palermo*, 259 F. 2d 872 (C.A. 3), a non-jury case where the trier of the facts had used patently improper standards in evaluating wilfulness, involved a prosecution for failure to pay income tax, rather than failure to file a return. The difference is crucial. "Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree." *Spies* v. *United States*, 317 U.S. 492, 497-498.

tory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony." *Spies* v. *United States*, 317 U.S. 492, 499. All the court meant by the quoted portion of the charge was what it spelled out elsewhere in the instruction—namely, that it was not incumbent on the government in this case to prove deceit, falsification, or attempt to evade a tax (cf. A-299). In addition, any error in this instruction was harmless in view of "the additional very comprehensive instructions on burden of proof" (Pet. 14). Furthermore, if petitioner's counsel deemed this portion of the charge prejudicial, he "should have stated the grounds for his objection as required by Rule 30" (Pet. 14) rather than have made merely a general objection.

The trial was fair and the evidence of guilt clear. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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